5-266

Motion to Dismiss

Nov 16 1877

Submitted

Record not printed

IN THE

# Supreme Court of the U. S.

No. 951 OCTOBER TERM, 1877.

IN THE MATTER OF C. ZUG, AND C. H. ZUG, BANKRUPTS.

NIMICK, AND OTHERS, Appellants.

Appeal From the Circuit Court of the United States, for the Western District of Pennsylvania.

## Motion to Dismiss Appeal.

Granted

Dismissed

GEO. SHIRAS, JR.
*for the Motion.*

PITTSBURGH, PA.
W. V. DERMITT, PRINTER, COR. GRANT AND DIAMOND STS.
1877.

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NIMICK, AND OTHERS, Appellants.

And now come The Bank of Pittsburgh, and others, individual creditors of C. Zug, and of C. H. Zug, bankrupts, and interested as distributees in the decree appealed from, and by George Shiras, Jr., their attorney, move the Court to dismiss said appeal, for the following

REASONS:

1st. The decree of the Circuit Court brought up by this appeal, was rendered by that Court in the exercise of its supervisory jurisdiction under the bankrupt law, and is not reviewable here.

*Morgan vs. Thornhill*, 11 *Wall*, 74.
*Hall vs. Allen*, 13 " 452.
*Mead vs. Thompson*, 15 " 638.
*Marshall vs. Knox*, 16 " 555.
*Coit vs. Robinson*, 19 " 278.
*Sandusky vs. Nat. Bank*, 23 " 289.
*Wiswall vs. Campbell*, 93 *U. S. Rpts.* 347.
*Conro. vs. Crane*, 94 *U. S. Rpts.* 440.

2nd. The record shows that the decree appealed from is not a final decree, in a controversy between the assignees or trustees and parties having an adverse title, but is an interlocutory order in bankruptcy proceedings, and from it no appeal lies.

3rd. In no aspect of the case is the decree of the Circuit Court final so as to be the subject of appeal.

The counsel who makes the motion to dismiss the appeal, does not deem it proper, in view of the repeated decisions of this Court, above cited, to discuss the merits of the motion; but he has transcribed, from the records of the District and Circuit Courts, enough to show the nature of the proceedings in those Courts.

The contention in the District Court was between the joint creditors of C. Zug and C. H. Zug, as partners, and their individual creditors, over the proceeds of the sale by the trustees, of certain real estate, standing of record in the names of the bankrupts, as tenants in common. The District Court awarded the fund in dispute to the individual creditors. This order of the District Court was taken to the Circuit Court by a Bill of Review, and was substantially affirmed. From this same order of the District Court an appeal was taken to the Circuit Court, and from the decree of the Circuit Court dismissing or quashing the appeal, the present appeal was taken.

GEO. SHIRAS, JR.

# APPENDIX.

IN THE

## *District Court of the U. S.*

—FOR THE—

WESTERN DISTRICT OF PENNSYLVANIA.

**No. 2675 In Bankruptcy.**

**In the Matter of the Petition of Christopher Zug and C. H. Zug, Partners as Zug & Co., for the Adjudication in Bankruptcy of Themselves.**

Certified petition and schedules filed March 11, 1876. March 13, adjudicated bankrupts. March 15, petition of bankrupts filed, a meeting of creditors called to consider a proposition of composition. April 15, composition rejected, and Reuben Miller and John S. Slagle elected trustees, and John Dunlap, Wm. Clark and W. H. Smith, as committee of creditors.

April 17, order directing conveyance by bankrupts to trustees. April 19, deed of bankrupts to trustees filed.

October 14, 1876, bankrupts discharged.

January 6, 1877, petition of Wm. Coleman and others, individual creditors of Christopher Zug and Charles H. Zug, and rule granted on the trustees to show cause why the Court should not resume and continue jurisdiction over the bankruptcy proceedings. January 18, 1877, answer of trustees filed. January 29, 1877, replication to said answer filed, and argument on petition, answer and replication. April 20, 1877, order made on the committee and trustees of said bankrupts' estate to exhibit and file within thirty days, an account of the estate, joint and several, of said bankrupts, their different properties, and money derived therefrom.

May 5, 1877, on motion of solicitor for trustees and committee, an order was made staying the said order until the decision of the Circuit Court upon the petition for review filed by said trustees and committee.

May 23, 1877, decree of the Circuit Court affirming the order of the District Court, except so far as it relates to the committee, as to whom the said order is reversed, and the petition or bill against them is dismissed, and also the direction to report distribution, which is stricken out as premature. May 28, 1877, on petition of trustees, and by order of Court, accounts of trustees filed. May 31, 1877, by order of Court, exceptions to said accounts filed, and the 8th prox fixed for taking testimony thereon.

June 12, 1877, accounts of trustees' confirmed *nisi*, and order filed directing the clerk to give notice to creditors of such confirmation, and that the same will be confirmed absolutely, if no exceptions be filed on or before the 25th inst. June 22, 1877, order made allowing exceptions

previously filed to stand as though filed anew, without prejudice, and exceptants allowed to file further exceptions to said accounts. Same day, by leave of Court, additional exceptions filed. June 25, exceptions to said trustees' accounts by the Bank of Pittsburgh filed.

July 13, 1877, decree of the Court, sustaining exceptions to trustees' accounts, discharging account of co-partnership estate from $130,000, proceeds of sale of Sable Iron Works, surcharging accounts of separate estate of Christopher Zug with four-fifths, and of Charles H. Zug with one-fifth of the same; confirming the accounts, as modified, absolutely, directing distribution in accordance therewith, and directing costs to be paid out of co-partnership estate, filed. July 21, 1877, notice of appeal from the said decree to the Circuit Court filed.

IN THE

# Circuit Court of the U. S.

—FOR THE—

WESTERN DISTRICT OF PENNSYLVANIA.

No. 162 November Term, 1877.

**In the Matter of Christopher Zug, and Charles H. Zug, Bankrupts.**

**Nimick, and others, Appellants.**

## COPY OF DOCKET ENTRIES.

Appeal from decree of the United States District Court, made in this cause July 13, 1877, allowed and filed July 21, 1877. Also, bond approved and filed, and notice of appeal with service thereon filed July 21, 1877. Same day record from U. S. District Court filed. August 4, motion to dismiss appeal and reasons filed. September 8, 1877, argued, C. A. V. September 22, 1877, as per opinion filed No. 163 November Term, 1877, appeal in above case quashed. September 29, 1877, counsel for Nimick & Co., and Reuben Miller, Jr., on their own be-

half, and on behalf of other joint creditors of the bankrupts, move the Court for an appeal in the above case to the Supreme Court of the United States, and a bond having been presented and approved, the appeal was allowed. October 6th, 1877, certificate of appeal to the Supreme Court certified to the U. S. District Court. October 6th, 1877, notice of appeal to the U. S. Supreme Court, with service endorsed thereon, filed. October 6, 1877, copy of bill for review No. 163 November Term, 1877, filed. October 23, 1877, certified copy of the record in the above case mailed to the clerk of the U. S. Supreme Court, at Washington, D. C.

## COPY OF DECREE.

An appeal was also taken from the order of the District Court, which it is moved to quash. An appeal is allowable only from the final decree of the Court in a suit in equity instituted by or against an assignee in bankruptcy, where the sum in controversy exceeds $500. As the record does not show that the order complained of was of that character, or was made in any such suit, no appeal lies from it, and the motion to quash is, therefore, allowed.

Clifford
No 951 Oct Term 1877

IN THE

# Supreme Court of the United States

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## In Re ZUG & CO., Bankrupts.

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APPEAL OF NIMICK & CO., et al., from Decree of Circuit Court of United States, Western District of Pennsylvania.

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# BRIEF OF APPELLANTS ON MOTION TO QUASH APPEAL.

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J. F. SLAGLE,
HAMPTON & DALZELL,
*Attorneys for Appellees.*

PITTSBURGH:
A. A. Anderson & Son, Book and Job Printers, No. 99 Fifth Avenue.
1877.

IN THE

# Supreme Court of the United States.

IN RE. ZUG & CO., BANKRUPTS.

APPEAL OF NIMICK & CO., ET AL., FROM DECREE OF CIRCUIT COURT OF UNITED STATES, WESTERN DISTRICT OF PENNSYLVANIA.

## STATEMENT OF CASE.

On March 11, 1876, the firm of Zug & Co., composed of Christopher Zug, and Charles H. Zug, filed a voluntary petition in bankruptcy in the District Court of the United States, for the Western District of Pennsylvania, and the firm and its members were thereupon adjudged bankrupt.

Among the property set out in the schedules appeared "the Sable Iron Works"—*returned as partnership property.* Those works covered about a square of ground in the city of Pittsburgh, and as appears by the subsequent proocedings in the cause, were purchased out of partnership funds for partnership purposes. They were always used and regarded as firm assets by the partners themselves.

At the first meeting of the bankrupts' creditors, held April 7th, 1876, a proposition of composition submitted by the bankrupts was rejected.

The creditors then agreed that the bankruptcy proceedings should be superseded by a trustee arrangement, under section 43 of the bankrupt act; and Reuben Miller and Jno. S. Slagle were chosen trustees, and John Dunlap, William Clark, and Wm. H. Smith, a committee. To these trustees the bankrupts made conveyance of their assets as defined in the schedules filed.

The court approved the arrangement, and made an order staying the bankruptcy proceeding.

The trustees entered upon the execution of their trust. They converted the entire estate into money. Assuming that to be partnership property, which was so called in the schedules, they declared and paid one dividend of ten per cent.

Proceeding further to wind up, settle and distribute the estate, they prepared a final account, submitted it to the committee by whom it was examined, approved and confirmed, (and a distribution ordered,) and then gave notice to the creditors of a final dividend of $32\frac{07}{100}$ per cent. to the joint creditors, $21\frac{446}{1000}$ per cent. to the separate creditors of Christopher Zug, and $5\frac{89}{100}$ per cent. to the separate creditors of C. H. Zug.

In this fund for distribution among the partnership creditors was some $130,000, realized from the sale of the Sable Iron Works.

Upon receiving notice of the final dividend, William Coleman and three others, creditors of C. Zug individually, filed exceptions with the committee to the accounts as allowed. These exceptions were in substance, that the account based on the correctness of the schedules was erroneous, because the Sable Iron Works property instead of being partnership property, was in point of fact (as they alleged) the property of C. Zug as to four-fifths thereof, and of C. H. Zug as to one-fifth. Pending the consideration of these exceptions by the committee, viz: on January 5, 1877, the exceptants presented a petition to the District Court embodying the same subject matter as their exceptions, and praying the court "to continue, or resume and continue, jurisdiction over said bankruptcy proceedings, and to order said trustees to exhibit and file in court just and true accounts of the estates, joint and several, of said bankrupts, to the end that the same might be duly audited and the estates of said bankrupts marshaled and distributed in due course and according to law."

The court thereupon granted a rule on said trustees to show cause why the prayer of the petitioners should not be granted. In response to said rule the trustees filed an answer, in which they denied any mingling of the separate estates and the partnership estate of the bankrupts, admitted the proposed distribution of the proceeds of the Sable Iron Works to the partnership creditors, asserted the partnership character of said works as appeared by the schedules, to which no one had objected, and asserted also the right of the committee to pass upon the questions presented, free from any control by the court, whose jurisdiction had been superseded by the trustee arrangement.

Two days after the filing of this answer the petitioners were allowed by the court to amend their proceeding by making the committee party thereto.

The committee answered, adopting in the main the answer of the trustees. To these answers the petitioners filed a general replication.

On April 20, 1877, the court ordered the trustees and committee to file their account in court.

On a review of this action, at the instance of the trustees and committee, the Circuit Court affirmed the order as to the trustees, but dismissed the petition as to the committee.

On May 28, 1877, the trustees filed their account in the District Court, and thereupon the exceptants before the committee renewed their exceptions in court.

Testimony was then taken for and against the exceptions in open court.

On June 12, 1877, the court ordered the clerk to give notice, by circular, to the creditors of the filing and confirmation *nisi* of the report, and that it would be confirmed absolutely, unless exceptions were filed on or before June 25.

The first exceptants then renewed their exceptions.

After argument the court made an order on July 13, 1877, sustaining the exceptions, discharging the account of the trustees of the joint estate of the amount realized from the sale of the Sable Iron Works, and surcharging the separate accounts therewith,—four-fifths to the account of one partner, and one-fifth to that of the other.

The court further "ordered, adjudged and decreed that said trustees do distribute and pay out, in accordance with this decree, the estate of said bankrupts in their hands to their creditors, respectively, who have proved their claims, *unless an appeal be taken from*, or a bill of review to this decree, within the time prescribed by law."

From this decree Reuben Miller, Jr. and Nimick & Co., on their own behalf and on behalf of other joint creditors of the bankrupts, took and perfected an appeal to the Circuit Court within ten days.

This appeal the petitioners and exceptants in the District Court moved to quash on the ground that the proceeding was not reviewable by appeal. This motion the Circuit Court allowed, saying: "an appeal is allowable only from a final decree of the court in a suit in equity instituted by or against an assignee in bankruptcy where the sum in controversy exceeds five hundred dollars. As the record does not show that the order complained of was of that character, or was made in any such suit, no appeal lies from it, and the motion to quash is therefore allowed."

The case is now in this court upon appeal from that decision.

While it is true that on the motion now made to quash, the merits of the case are not fairly before the court, it is proper for us to say that the question in the court below was purely one of law. About the facts there was no dispute. It was conceded that the Sable Iron Works had been paid for by the partnership funds of Zug & Co., had been purchased for partnership purposes, held, improved and insured as partnership property, and by both partners always so regarded.

The petitioners in the court below contended—

1. That by the decisions of Pennsylvania courts the record title, which was in the partners as tenants in common, was conclusive as to the character of the property.

2. That the *lex rei sitæ* was conclusive on the Federal Courts.

On the other hand the trustees and the partnership creditors contended—

1. That the question arising upon the distribution of the equitable assets of an insolvent partnership was one of general equity jurisprudence, in which the Federal courts follow general equity principles irrespective of the State decisions, and that in cases analygous to the one at bar the Federal courts had decided against the rulings of the State courts. They cited:

McFarland vs. Griffith, 4 *W. C. C. Rep.*, 585
U. S. vs. Howland & Allen, 5 *Wheaton*, 408.
Livingston vs. Story, 9 *Peters*, 632.
Zaccheus vs. Turner, 6 *Peters*, 657.
Neves vs. Scott, 13 *Howard*, 272.
Russel vs. Southard, 12 *Howard*, 139.
Ottowa vs. Perkins, 4 *Otto*.

2. That the precise question in this case had never been decided in Pennsylvania. That a distinction was apparent between this case and every authority upon the general subject in the Pennsylvania courts, and finally that as the rule is held in England and the United States generally, whether by State or Federal courts, the Sable Iron Works belonged to the partnership creditors of Zug & Co.

They cited:

*Parsons on Partnership*, 363.
*Collyer on Partnership*, sec. 135.
1 *Leading Cases in Equity*, 240 *et seq.*
Tillinghast vs. Champlin, 4 *R. I.*, 173, 188.
Buchan vs. Sumner, 3 *Barn. Ch.*, 198.
Hoxie vs. Carr, 1 *Sumner*, 182.
*Bispham's Equity*, 511, 513.

## BRIEF OF ARGUMENT.

In opposition to the motion to quash the appeal in this case, we shall rely upon the following propositions:

I. The District Court acted without jurisdiction. Three fourths in value of the creditors of Zug & Co., whose claims had been proved, having determined that the estate should be wound up in the manner prescribed by the 43rd section of the Bankrupt Act, and their resolution having been confirmed by the District Court, there was no longer any power in that court to control the discretion of the committee, acting *bona fide* in the distribution of the bankrupt's estate.

2. But even if the District Court had jurisdiction it could not be exercised in a summary manner, such as is only reviewable in the Circuit Court, under its supervisory power.

3. If the District Court acted without jurisdiction, or if having jurisdiction, it improperly sought to exercise it by summary process, an appeal lies to this court.

I. Our first proposition is sustained by the decision of Strong, J. *In re.* Jay Cooke & Co., 11 *Nat'l B. Reg.*, 15–20.

His Honor there points out the distinction between the mode of settling a bankrupt's estate, prescribed by the 27th and 28th sections of the Act, and that prescribed by the 43d section. He notices the fact that under the former "very large powers over the winding up, settlement and distribution of a bankrupt's estate are given to the District Court, and to a majority in value of the creditors who may be present at a general meeting." He then goes on to say:

"But the 43rd section prescribed another system, the obvious purposes of which were to arrest the ordinary mode of proceeding to wind up, settle, and distribute a bankrupt's estate, to suspend some of the powers conferred upon the District Court, and to confer upon the representatives of the creditors authority not to be exercised by the general body. The system was extraordinary. It was borrowed from a system which had previously existed in Scotland and in Eng-

land, *which had for its object the withdrawal of the bankrupt's estate from the Courts in certain cases, and placing its administration in the hands of the bankrupt himself, or in that of the chosen representatives of the creditors.*

An examination of the provisions of that section shows very clearly that such was its object, and that the powers conferred thereby are inconsistent with the continued existence of the powers given by the 27th and 28th sections. It is entitled, 'of *superseding* the bankrupt proceedings by arrangement.'

* * * * * * * * * *

If, when three-fourths in value of the creditors who have proved their debts have resolved that the estate shall be wound up, settled, and distributed under the direction, *not of the court* or the general body of creditors, but of a committee chosen by them, and their resolution has been confirmed by the court, and when consent to such an administration has been filed, *either the court* or a general meeting of creditors can control the discretion thus vested in the committee; * * * how does the manner of administering the estate differ in substance from the ordinary manner presented in the 27th and 28th sections? What becomes of the power of the committee to direct the settlement and distribution?"

Consistent with this mode of reasoning, it was the decision *In re.* Jay Cooke & Co. that the direction of the committee to the trustee was conclusive, and not the subject of control *either by court or creditors.*

But there is a special reason, in the case at bar, why the court had no jurisdiction to interfere. The bankruptcy proceedings were suspended by arrangement, *upon the faith that the estate would be distributed as it was by the trustees and committee.*

The schedules filed by the bankrupts disclosed the fact that the Sable Iron Works, the bone of contention, were the partnership property of the bankrupts, distributable under the Act to their partnership creditors.

The correctness of these schedules, sworn to by the bankrupts, and constituting the basis of the proceeding, stood unchallenged up to the time that the trustee arrangement was made, and until long after the first dividend had been declared and paid. Upon the basis of the correctness of these schedules the estate was administered,

assets all converted, an account filed by the trustees, approved by the committee, and a distribution ordered accordingly.

Upon the basis of these schedules three questions were presented to the creditors: 1. Shall the estate be administered in the ordinary mode under sections 27 and 28? 2. Shall it be administered under a composition proceeding (section )? 3. Or, shall the proceedings be superseded by a trustee arrangement under section 43?

Assuming the correctness of the title, as stated in the schedules, the creditors, at a meeting duly called, negatived the first two questions and affirmed the third.

*Non constat*, that had the title to the Sable Iron Works been declared to be in the individual, and not the partnership, creditors, any such arrangement would have been accepted. *Non constat*, that the bankrupts' offer of composition would have been rejected. *Non constat*, but that an assignee would have been selected to settle the estate and distribute it *under the direction of the court.*

Upon the faith of these schedules, as filed, the bankrupts hung their hope of a discharge by the payment of 30 per cent. of their indebtedness. It is now proposed to so alter their assets that the partnership creditors cannot, by any possibility, receive anything like that amount.

Having lost jurisdiction by the act of three-fourths in number and value of the bankrupts creditors, could that jurisdiction be resumed upon the application of three or four?

Could it be resumed on the application of three or four, who, having had their day in court, admitted (by not denying) the correctness of the bankrupts' schedules, and upon whom the trustee arrangement was, by the provisions of the bankrupt act, conclusively binding?

Pursuant to the solemn action of the creditors, the bankrupts' whole estate was assigned to the trustees, and the title they took was in law and in fact that set out in the schedules.

All parties in interest being in court when the trustee arrangement was confirmed, the trustees' title to the Sable Iron Works, as the property of the bankrupts' partnership creditors, was adjudicated.

II. Could that title be divested by a summary proceeding, as was attempted to be done in the District Court?

The parties to the trustee proceeding were the bankrupts and their creditors. The parties to the proceeding of which we complain were the trustees (and subsequently the committee) and certain of the creditors. The subject matter of the proceeding was the trustee's title. No language could more precisely and accurately describe the situation than that of Swayne, J., in Lewis, Trustee vs. The United States, 2 *Otto*, 618: "The case presented is that of a trust fund, a trustee holding and a *cestui que trust* claiming it."

Did such case present in any proper sense any of the features of a suit in bankruptcy?

It certainly did not call for a motion to be made or an act to be done in the bankruptcy court in the progress of the cause. The cause had been finally ended, *superseded* by the action of the creditors themselves. By the joint action of all in interest, the court approving, the trustees took title. An inquiry into that title, at the instance of a party claiming adversely to the trustees, was not a proceeding in the bankruptcy cause, simply because the claimant was a creditor in that cause. To adopt again the language of Swayne J., in Lewis, Trustee vs. United States, *supra*. "That the fund arose and the trustee was appointed under the bankrupt act did not affect the right of the United States to pursue both by the exercise of the jurisdiction invoked. The same remedies are applicable as if the fund had arisen, and the trustee had been appointed in any other way."

We invite the attention of the court to the bearing of the decision in the case cited upon the case at bar. In the former, Lewis was trustee of the estate of Jay Cooke & Co., bankrupts, selected and acting under the same section of the same act as that under which the trustees in this case were chosen and acting. In that case, as in this, the bankruptcy proceeding had ended, been superseded. In that case, as in this, a creditor claimed adversely to the ruling and decision of the trustee and committee. In that case the remedy invoked was *by bill in equity in the Circuit Court*. That remedy this court sustained. If it was the proper remedy there, the remedy of the appellees was improper here. If, by the selection of the *proper* remedy the rights of parties may be passed upon by this court, can a party deprive his adversary of his right to the judgment of this court by the institution of an *improper* proceeding? Can form

prevail against substance? Can an erroneous judgment of the lower court bid defiance to correction because improperly rendered under shield of a form of proceeding from which the law provides no appeal? That would indeed be a wrong without a remedy brought about by a very simple device.

In Smith vs. Mason, assignee, 14 *Wallace*, 419, an assignee in bankruptcy, undertook, by summary process, under the first section of the bankrupt act, to settle his title to property of the bankrupt claimed adversely by an outside party. Under this section the party defendant had no appeal to this court. But this court looking behind the form to the substance, considered the proceeding as if it had been properly instituted and allowed an appeal.

In Marshall vs. Knox, 16 *Wallace*, 555, an assignee in bankruptcy, undertook, by summary process in the bankruptcy proceeding, to take out of the hands of a sheriff certain property by him held under a distress for rent.

The sheriff appealed from the action of the District Court, but his appeal was not allowed. He then filed a bill for an injunction in the Circuit Court. This court held, (1), That the bill could not stand as an original bill if the District Court had jurisdiction to proceed as it did, for the matter had already been adjudicated in that court: (2), That if it could stand as a bill for a review, then no appeal from the Circuit Court would lie; but, (3), This court then went on to say: "The appeal, therefore, must be dismissed, *unless it can be shown that the District Court proceeded without jurisdiction.* If this were the case, then the bill may be regarded as an original bill, of which the Circuit Court clearly had jurisdiction, and the appeal to this court was properly taken."

So again in Stickney, assignee, vs. Wilt, 23 *Wallace*, 150, it was held that a proceeding commenced in the District Court by petition, by an assignee in bankruptcy, to invalidate certain alleged liens, and to obtain an order of sale of the bankrupts' property was "a case in equity within the eighth section of the bankrupt act, which gives an *appeal* to the Circuit Court in all cases in equity; and was not a case for the general superintendance and jurisdiction by that court, given in the second section of the act, in cases where no provision for the supervision of the Circuit Court is otherwise made."

It was there held that the Circuit Court could have jurisdiction of the proceeding only *by appeal*, and its decree made under a petition for review was reversed.

It is not pretended to be denied that under the rulings of this court in Morgan vs. Thornhill, 11 *Wallace*, 65, and the numerous cases which, with varying facts, consistently follow it, no appeal lies to this court from a decree of the Circuit Court exercising the supervisory jurisdiction conferred upon it by the second section of the bankrupt act. It is asserted, however, and most earnestly urged, that the proceeding appealed from was not such as the Circuit Court had supervisory jurisdiction over under said section. It was neither a motion in the bankruptcy proceeding, and constituting part of it, nor an interlocutory order or decree, but an original proceeding, (the decree in which was final), like Lewis, trustee, vs. The United States, *supra*, between the trustees and a claimant adverse to their title.

It is therefore neither a proceeding within the supervisory power of the Circuit Court, nor within that jurisdiction which the Circuit and District Courts have concurrently. (*Bankrupt Act, Sec.* 2*d*, 3*d Clause.*)

III. Whether then the District Court acted without jurisdiction, or whether, having jurisdiction, the proceeding was in reality a proceeding in equity, the conclusion in either event, in view of the cases cited, sustains our right to an appeal. (*Bankrupt Act, Sec.* 8, *Rev. Stat., Sec.* 691.)

It is material to be noted that in the selection of remedies and the choice of proceedings the appellants had no voice. They had been from the beginning of the proceeding on the defensive, never on the attack. No necessity existed for any movement on their part to secure what they claim to be the proper distribution of the bankrupts' estate. The schedules defined the bankrupts' title as appellants claimed it to be. All the creditors entered into the trustee arrangement on the assumption that that title was as stated. The trustees took title in that way; they administered the estate and filed their final account with the committee consistently therewith. By that account the appellants were entitled to take the property of which the decree of the court below now deprives them. The trustees and the appellants were of one mind, occupied one ground, and

those who initiated the proceeding attacked both. The only voice the appellants had was by protest and in defence. They are in no wise answerable for the shape of the proceeding.

Hence it would appear that any mistake as to the form of remedy selected by their adversary could not justly be visited upon the appellants to their disadvantage.

HAMPTON & DALZELL,
J. F. SLAGLE.